89-639

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.

Petitioner,

v.

JOHN D. ROCKEFELLER, ET AL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. 1

Does telemarketing presumptively present the same solicitation risks and dangers which face-to-face in person solicitation presents regarding the exercise of fraudulent sales tactics, overreaching, undue influence or coercion by the soliciting party. Does a Constitutional First Amendment analysis of the regulation of telemarketing therefore proceed under the more restrictive regulatory control prohibitions for face-to-face solicitation as established by prior decisions of this Court? Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); Shapero v. Kentucky Bar Association, 486 U.S. _____ 108 S.Ct. 1916 (1988).

ISSUE NO. 2

In the regulation of commercial speech which is not content neutral, does a total

prohibition on an otherwise permissible mode of advertising without a showing that the fashioned regulation is necessary or reasonable in light of the enunciated State interest, constitute regulation in a manner which is narrowly tailored to achieve the State's desired objectives? Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Board of Trustees of the State University of New York v. Fox, ____ U.S. ____ Case No. 87-2018 (decided June 29, 1989).

ISSUE NO. 3

Does the legitimate State interest in protecting the right of privacy in the home when balanced against commercial rights of free speech guaranteed by the First Amendment permit a State to impose an absolute regulatory prohibition on door-to-door or telephonic solicitation of preneed funeral

goods and services, when at the same time the State does not regulate telephonic and door-to-door solicitation for all other types of goods and services? Martin v. Struthers, 319 U.S. 141 (1943) and Frisby v. Schultz, 56 U.S.L.W. 4785 (June 28, 1988).

ISSUE NO. 4

In regulating against a particular commercial activity, can the State's police powers regulate only a portion of those individuals who act in a manner which threatens legitimate State interests while at the same time exempting from regulation, without any rational basis, and contrary to statutory intent, other individuals or entities who also undertake the same prescribed deleterious activities? New Orleans v. Dukes, 472 U.S. 297 (1976).

ISSUE NO. 5

Do United States Supreme Court decisions require a Supremacy Clause preemption

analysis to also consider the effect of inferior legislation upon a clearly stated superior federal policy? Hines v. Davidowitz, 312 U.S. 52 (1941); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

RULE 28.1 LIST

National Funeral Services, Inc., is a privately owned subsidiary of Legacy One, Inc., a West Virginia privately owned corporation, both said corporations have a financial interest in the outcome of this proceeding.

PARTIES:

Petitioners (Plaintiffs below):

John D. Rockefeller, IV, et al, Governor of the State of West Virginia, State of West Virginia, West Virginia Department of Labor, Lawrence Barker, Commissioner

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Respondents (Defendant below):

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Statutes and other Authorities

REFERENCE TO OPINIONS BELOW:

National Funeral Services, Inc. v. John D. Rockefeller, 870 F.2d 135 (4th Cir. 1989) (See Appendix)

STATEMENT OF THE GROUNDS OF JURISDICTION

1. Date of judgment sought to be reviewed: March 7, 1989; (see appendix), Motion for Rehearing and Suggestion for Rehearing In Banc denied by order dated and entered June 1, 1989 (see appendix).

2. Statutory provisions conferring jurisdiction on this Court: 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES

(See Appendix for full text)

U.S. Constitution Article I, § 8, Article VI, § 2
U.S. Constitution First Amendment
U.S. Constitution Fifth Amendment
U.S. Constitution Fourteenth Amendment
15 U.S.C. § 45
28 U.S.C. § 1291
28 U.S.C. § 1332

28 U.S.C. § 1343
28 U.S.C. § 2201
42 U.S.C. § 1983
16 C.F.R. § 453 (1984)
WV Code § 47-14-1 et seq.
WV Code § 46A-2-132

BASIS FOR FEDERAL JURISDICTION

A. UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA

United States Constitution, Article I, § 8, Article VI, § 2
First, Fifth, and Fourteenth Amendments to the United States Constitution
Bill of Rights
28 U.S.C. § 1332 § 1343(e)(4)
28 U.S.C. § 2201
42 U.S.C. § 1983
15 U.S.C. § 45

B. UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

28 U.S.C. § 1291

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

II. STATEMENT OF THE CASE

In August of 1980, the Petitioner, National Funeral Services, Inc., a West Virginia corporation, was incorporated and commenced doing business in southern West Virginia in the Beckley, Oak Hill and Princeton areas and in the northern panhandle of West Virginia in the Martinsburg area.

The Petitioner, National Funeral Services, through its employee sales personnel, marketed preneed funeral goods and services to its customers through newspaper advertisements, door-to-door solicitation, mass mailings, prior lead solicitation and telemarketing.[1]

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[1](Preneed funeral goods and services are funeral goods and services marketed to a purchaser prior to the demise of the individuals who will use the goods and services.)

National Funeral Services did not conduct cold canvassing of residences in any area but instead followed up on leads obtained from other sources. These leads were designed to determine and locate individuals in particular geographic areas which might be interested in purchasing preneed funeral goods and services.

The Petitioner is a wholly owned subsidiary of Legacy One, Inc., a West Virginia corporation which owns directly or indirectly over a dozen cemeteries and funeral homes throughout the southeastern and midwestern United States. Legacy One, Inc. was originally incorporated in the 1950's and has operated in the cemetery and funeral business in several different states since its incorporation.

The marketing program of National Funeral Services sought to take advantage of

the structural pricing distortions in the funeral industry which are caused by social factors dictating at-need purchases by the deceased's bereaved relatives at a time which precludes effective price or product comparison shopping.

Structural pricing distortions have also occurred because the funeral industry in the United States has experienced very little price or product competition due to the lack of any dissemination of pricing or product information.

In fact the lack of product and pricing information, along with social factors which dictated in favor of at-need purchasing situations were found by the Federal Trade Commission to be the principal market defects which perpetuated anti-competitive forces in the funeral industry markets and requiring the promulgation of 16 C.F.R. 453 (1984).

The preneed funeral goods and services marketed by National Funeral Services consisted of a myriad of funeral goods including caskets, head stones, markers, monuments, funeral clothes, embalming chemicals, urns, burial vaults, and chapel vaults. In addition the Petitioner marketed preneed funeral services which included the performance of the funeral rites, preparation of the body by embalming, provision of viewing facilities, delivery of the body to the cemetery, graveside services and the storage of human remains prior to burial.

Customers entering into these contracts with National Funeral Services ranged in age from their mid-twenties to late seventies. The customer would pre-select funeral packages or individual items which were discussed and described by the salespersons in the customer's homes. The customers could

thereby preplan both the total cost of the funeral and the particular items desired for their funerals according to their own personal tastes and available finances.

The preneed contracts entered into were installment contracts in compliance with federal and state truth in lending laws and other applicable consumer credit laws. These contracts were also subject to West Virginia State laws providing for the cancellation of door-to-door solicitation contracts within seventy two (72) hours of the sale without any penalties to the customer. W.Va. Code § 46A-2-132.

Furthermore, the customer or his/her legal representative could cancel the contract at any time prior to performance and thereby receive a refund of ninety percent (90%) of the original contract amount paid,

plus accrued interest. W.Va. Code § 47-14-6(b).

Beginning in 1974, the Federal Trade Commission instituted formal administrative hearings which were held throughout the United States in order to address the perceived lack of price and product information in the funeral industry and the resultant anti-consumer effects in the funeral industry markets. The rule which was ultimately issued by the Federal Trade Commission at 16 C.F.R. 453 (1984) was a product of approximately ten (10) years of extensive evidentiary hearings and exhibit review.

The Federal Trade Commission rule compels the disclosure of price and product information by telephone, and the delivery of an itemized pricing list for goods and services to be performed. In addition, the

rule prohibits certain unfair or deceptive practices which the Federal Trade Commission discovered within the funeral industry during its investigation.

In 1983 following extensive lobbying by the West Virginia and National Funeral Directors' Association, the West Virginia Legislature amended and passed West Virginia Code § 47-14-1 et seq. (1983) dealing with the regulation of preneed funeral goods and services. The stated policy of this legislation was to assure that funds paid on a preneed basis for funeral goods or services to be delivered or performed at a later date were not dissipated or otherwise depleted, and to further guarantee that adequate funding was available at the time of need in order to assure the later performance of any preneed contractual promises made by contract sellers.

Section 47-14-1 et seq. (1983) sought to assure that the person who holds, controls, or manages funds taken in payment for preneed promises was subject to the limitations and regulations prescribed by the statute.

In stark contrast to this stated policy, Code § 47-14-2 provides an exemption for the sale of traditional cemetery marketed preneed goods which are some of the exact same goods which regulated preneed contract sellers and providers are selling in West Virginia. Furthermore, Code § 47-14-2 provides an exemption for the sale by cemeteries "funeral goods or services" on a preneed basis regardless of the stated intent of Code § 47-14-1.

Section 47-14-2(7) provides:

> "funeral goods does not mean services actually performed by a cemetery acting only as such or the sale by a cemetery of cemetery lots, land or interest therein,

services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults, or vaults constructed or to be constructed in a mausoleum or columbarium." West Virginia Code § 47-14-2(7) (1983) (underscore supplied)

Funeral homes and preneed funeral providers sell many funeral goods and services which cemeteries do not sell. For example, caskets, body preparation, funeral clothes. However, many burial items are sold by both funeral homes and cemeteries. For example, vaults, monuments, markers, memorials, crypts, urns, and sometimes caskets. While the stated policy of the legislation was to require the regulation and trusting of all funds taken under preneed sales in order to protect the public, Section 47-14-2(7) provides an express exemption for many preneed product sales so long as the sales are made by a cemetery or so long as

they are sales of a product type traditionally offered by a cemetery.

West Virginia Code § 47-14-10 also provides for explicit prohibitions on the solicitation of personal residences by telephone call or personal visit unless such solicitation was previously requested by the person solicited or by a family member residing at the residence.

While all other forms of advertising are left open to the Petitioner, telephonic solicitation and door-to-door solicitation is absolutely prohibited unless previously requested by the customer.

Noticeably absent from the stated legislative intent of West Virginia Code § 47-14-1 et seq. is any legislative finding that personal door-to-door solicitation or telemarketing of preneed funeral goods or services by their very nature are subject to

overreaching, coercion, overbearing or other sophisticated sales pressures which will preclude or demean the customer's ability to carefully and fully evaluate the contractual proposals.

Not only was there a lack of general legislative findings or legislative intent in these regards, but at the trial of this matter, the State of West Virginia failed to present any evidence to allege that the salespersons of National Funeral Services or any other salespersons in the State of West Virginia were exercising coercion or overbearing sales techniques in the sale of preneed funeral goods and services. The State's case in these regards rested solely upon the State's paternalistic opinion that consumers would be offended by the uninvited intrusion of a salesperson who seeks to sell funeral goods and services.

In rebuttal of this position, National Funeral Services introduced evidence at the trial of this matter which showed a high degree of willingness on the part of consumers to discuss the proposed preneed sales contracts. In a preemptive rebuttal of the State's arguments of overreaching and coercion (which never factually materialized) National Funeral Services introduced evidence which showed that the total closing percentage for all sales presentations given was only thirty percent (30%). However, the cancellation percentage for contracts executed ran only approximately ten percent (10%) even with seventy two (72) hour and perpetual cancellation rights pursuant to West Virginia Code § 46A-2-132 and § 47-14-6.

The preneed funeral goods and services sold by National Funeral Services were generally sold in the customer's home where a sales presentation was made which disclosed

the different product and price options available.

National Funeral Services sold thousands of preneed contracts in its three (3) years of existence. Many of these contracts were sold to consumers in areas of West Virginia which included long and firmly established local funeral homes.

Many of these funeral homes could lose considerable future business by the sale of preneed contracts and many of these same funeral homes were instrumental as members of the West Virginia Funeral Directors' Association in the promulgation and passage of the legislation challenged therein.

Due to the statutory regulation challenged, the Petitioner has been forced to cease all business operations in West Virginia and has in fact not sold any further preneed funeral goods or services under

preneed contracts in the State of West Virginia since the judicial upholding of West Virginia Code § 47-14-1.

Following the passage and signing of West Virginia Code § 47-14-1 et seq., the Petitioner filed this action in the United States District Court for the Northern District of West Virginia seeking a preliminary injunction and challenging the Constitutionality of West Virginia Code § 47-14-1. In the same action, the Petitioner filed anti-trust claims against the West Virginia Funeral Directors' Association and numerous individual funeral directors in West Virginia for conspiring to restrict and restrain competition within the funeral industry.

This matter was transferred to the Southern District of West Virginia and the Petitioner was initially granted a temporary

restraining order and a preliminary injunction pending the final adjudication of the Constitutional issues presented by the challenged statute.

The anti-trust claims resulted in an agreed settlement between most of the parties and judgment for the Plaintiff against two of the parties. The Constitutional challenge was bifurcated by the United States District Judge for trial on or about December 13, 1985.

By later order and opinion, the Court upheld the Constitutionality of the statute and the Petitioner requested a reconsideration of the Court's judgment and a new trial. The Petitioner's request for a new trial and reconsideration of judgment was denied in February of 1988.

The Petitioner appealed the District Court's ruling to the Fourth Circuit Court of

Appeals and by order and decision dated and filed March 7, 1989, the Court of Appeals affirmed in all regards the District Court's decision. The Petitioner timely filed a motion for rehearing in banc and the Court of Appeals denied the Petitioner's motion for rehearing by order and decision dated and filed June 1, 1989.

REASONS FOR GRANTING THE WRIT

ISSUE NO. 1

Does telemarketing presumptively present the same solicitation risks and dangers which face-to-face in person solicitation presents regarding the exercise of fraudulent sales tactics, overreaching, undue influence or coercion by the soliciting party? Does a Constitutional First Amendment analysis of the regulation of telemarketing therefore proceed under the more restrictive regulatory control prohibitions for face-to-face

solicitation as established by prior decisions of this Court? Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); Shapero v. Kentucky Bar Association, 486 U.S. _____ 108 S.Ct. 1916 (1988).

ISSUE NO. 1

In what may be a case of first impression, the Courts below in applying a First Amendment commercial speech analysis were required for the first time to consider the Constitutionality of a content based regulation which completely banned the use of unsolicited telemarketing. The ban on telemarketing applies only to preneed funeral goods and services. Telemarketing as used in the case at bar did not include a consummated sale by phone but instead the establishment of an appointment for a home visit for the purpose of soliciting a sale.

Both the Constitutional issues and the implications of permitting States to totally prohibit the use of telemarketing in any form will have a far reaching impact upon hundreds of thousands of entities and individuals who use telemarketing in the United States. Telemarketing is used to sell or solicit almost everything in the United States from the sale of fungible goods to the solicitation of charitable contributions.

The issue in the case at bar was further aggravated by the fact that the State of West Virginia has never attempted in any manner to prohibit the use of telemarketing for any other defined entity, or for any other goods and services. West Virginia only prohibits the use of telemarketing to individuals or entities who attempt to market preneed funeral goods or services. The State did assert the dual police power rationales of

protecting privacy rights and protecting against undue influence or fraud. However, the State also continued to assert its right to regulate because of the nature and type of the goods being sold. The State, for evidently paternalistic reasons, asserts that preneed funeral solicitors would be offensive to individuals in the sanctity of their own homes.

In its legal analysis which upheld the State's regulation, Judge Hall in issuing the opinion of the Fourth Circuit analogized preneed telemarketing regulation with the face-to-face solicitation of business opportunities by lawyers, a specific type of regulation which has previously been upheld by this Court. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

However, in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), this Court

upheld the bar disciplining of a lawyer who solicited business face-to-face with a potential client. This Court emphasized as the principle basis for its decision in Ohralik, the inherent opportunity for overreaching in a face-to-face setting. In this limited regard, the State's substantial governmental interest in protecting potential clients of attorneys outweighed the commercial First Amendment right to solicit in a particular setting. This Court emphasized the unique nature of in-person face-to-face solicitation which does not provide any coercion protections or avoidance opportunities for the potential customer.

However, contrary to Judge Hall's legal rationale, this Court apparently already has stated (albiet dicta) that the powers of a State to prohibit totally a particular method

of solicitation may very well be restricted to in-person face-to-face solicitation.

In Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988), this Court once again overturned an absolute State prohibition on a form of professional sales solicitation. In Shapero, a Kentucky lawyer was delivering a targeted mail advertising for the purposes of soliciting legal clients. In applying the legal rationale of Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Ohralik, this Court stated that when attempting to determine the potential for overreaching or undue influence, the "mode of communication makes all the difference". Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 at 1922 (1988).

This Court's reasoning in Ohralik for upholding the authority of a State to totally

prohibit a form of commercial speech was based upon the nature of in-person solicitation which could be inherently coercive because of the personal presence of the soliciting party.

In Shapero while this Court noted that even targeted mailings could be subject to abuses, the opportunities for isolated abuses or mistakes could not and would not justify a total ban on that mode of protected commercial speech.

While this Court has not directly addressed telephone solicitation in the context of a commercial free speech regulation, it would appear that the rationale that this Court used in Ohralik to permit a total prohibition on face-to-face solicitation simply does not apply in the situation of telemarketing. The recipient of a telemarketing solicitation can merely hang

up on the telemarketer just as the letter recipient in Shapero could discard the letter.

Finally the Petitioner would point out that as in Shapero, the record in the case at bar is totally devoid of either a legislative finding regarding the adverse effects of telemarketing or face-to-face solicitation in the sale of preneed funeral goods and services. The record is also totally devoid of any evidence at the trial of this matter which would disclose that the parties who are prohibited from telemarketing and preneed solicitation on a door-to-door basis have in fact exhibited or exercised any coercion, fraud, or undue influence in the past upon the consuming public.

Clearly Judge Hall's legal rationale for upholding the State's telemarketing ban is not in conformance with this Court's

decision in Shapero v. Kentucky Bar Association. Furthermore the asserted State interests for imposing the ban are totally unsupported by the record in addition to their conspicuous absence from any legislative intent or history. In regulating commercial free speech, a State has the burden of providing evidence justifying restrictions on speech. Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978).

Petitioner submits for the reasons stated herein that the issue relating to the content based regulatory prohibitions upon telemarketing are important federal questions which have not been, but should be, settled by this Court. Petitioner also submits that the Court below appears to have decided this issue in a manner which is inconsistent with opinions uttered previously by this Court.

ISSUE NO. 2

In the regulation of commercial speech which is not content neutral, does a total prohibition on an otherwise permissible mode of advertising without a showing that the fashioned regulation is necessary or reasonable in light of the enunciated State interest, constitute regulation in a manner which is narrowly tailored to achieve the State's desired objectives? Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Board of Trustees of the State University of New York v. Fox, ____ U.S. ____ Case No. 87-2018 (decided June 29, 1989).

ISSUE NO. 2

This Court's decision in Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) outlines the applicable standards of review in situations where States seek to regulate the exercise of commercial speech.

In Central Hudson Gas v. Public Service Commission, this Court stated:

> "In commercial speech cases, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For that provision, it at least must concern lawful activity and must not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest." Central Hudson Gas v. Public Service Commission, 447 U.S. at 556.

In Board of Trustees of the State University of New York v. Fox, ____ U.S. ____ 1989, Case No. 87-2013 (decided June 29, 1989), this Court for the first time directly addressed the necessity of applying a least restrictive test on regulatory alternatives for commercial speech, particularly as those

concepts were being applied by the several Courts of Appeals in the United States.

This Court rejected a structured test which would require the Courts of Appeals to uphold only the absolutely least severe method of commercial speech regulation which would achieve the desired goals of the State.

However, the Court clearly stated that a "reasonable fit" between the government's ends and the means chosen to accomplish those ends must be established by the State. Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. 328 at 341; In Re R.M.J., 455 U.S. 191 (1982) at 208; Board of Trustees of the State University of New York v. Fox, ___ U.S. _____ (1989), Case No. 87-2013 (decided June 29, 1989); slip opinion, pages 5 to 11.

Furthermore, Justice Scalia in delivering the opinion of the Court

enunciated that the "reasonable fit" standard established by Board of Trustees of the State University of New York v. Fox was not to be construed or applied as a return to a mere rational basis test of the type which is generally applied to a State's legislative regulation of commercial or economic endeavors.

Justice Scalia also pointed out that commercial speech restrictions previously disallowed by the Supreme Court under the Central Hudson analysis had been substantially excessive, disregarding far less restrictive and more precise means. Shapero v. Kentucky Bar Association, 486 U.S. _____, 108 S.Ct. 1916 (1988); slip opinion, page 9.

However, at the same time, this Court has previously overturned State regulations of commercial free speech which are absolute

prohibitions upon the exercise of some particular form of communication in the event some other method of regulation will achieve State interests. Shapero v. Kentucky Bar Association, 486 U.S. ____, 108 S.Ct. 1916 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); In Re R.M.J., 455 U.S. 191 (1982); and Bates v. State Bar of Arizona, 433 U.S. 350 (1970).

Justice Scalia expressly rejected any attempted correlation between the "reasonable fit" test enunciated by Board of Trustees of the State University of New York v. Fox and the "rational basis" test used to analyze fourteenth Amendment equal protection considerations for general economic regulations. Justice Scalia stated as follows:

> "We reject the contention that the test we have described is overly permissive. It is far

> different, of course, from the rational basis test used for Fourteenth Amendment equal protection analysis. See e.g. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see Zauderer, supra at 647, it must affirmatively establish the reasonable fit we require." Board of Trustees of the State University of New York v. Fox, ___ U.S. ____ (1989), Case No. 87-2013 (decided June 28, 1989); slip opinion at page 10. (underscore supplied)

In the case at bar, the government's goal as set forth in the statute is to protect and preserve the trusted monies. The Petitioner submits that the potential cost of this regulation of commercial speech which conveys totally truthful service and product information is not carefully calculated and

furthermore is not a "reasonable fit" designed to achieve the substantial State interests in question.

If on the other hand the Courts are to accept the State's undocumented and factually unsupported assertions that the statute is instead directed at protecting the privacy of the home and consumer rights, then the critical question now presented to this Court comes to the forefront.

If the State proceeds to totally prohibit an accepted truthful mode of commercial advertising for only one type of goods or services, to what extent must the State be required to support factually or procedurally its content based regulation?

If the record and statutory intent are devoid of any such factual or procedural findings, Petitioner submits that Federal Courts will be endorsing a "rationale basis"

economic regulation test in instances where fundamental First Amendment rights demand a more stringent test. This ultimate result as presented by the case at bar is directly contrary to this Court's ruling in Board of Trustees of the State University of New York v. Fox, ___ U.S. ___ 1989, Case No. 87-2013 (decided June 29, 1989).

Contrary to this Court's decisions, the Fourth Circuit has made no attempt to determine whether or not the State regulation in question is a "reasonable fit" or whether the regulation is more extensive than necessary.

Justice Scalia cites Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. at 841:

> "A fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, "

In the decision of In Re R.M.J. supra at 208, this principle was also elaborated upon as follows:

> "That employs not necessarily the least restrictive means but, as we have put in the other context discussed above, a means narrowly tailored to achieve the desired objective."

If the interest served is to protect against the improper use of trusted funds, then the solicitation prohibitions are irrelevant. If the interest served is the right of privacy, how can the prohibition of only one type of telemarketing or one type of door-to-door solicitation protect individuals in their homes against unwanted intrusion? And finally if in fact the right of privacy is being encroached upon by the Petitioner, why is there no factual support for this contention in the record and why is there not only an absence of legislative factual support but an absence of even a legislative

acknowledgment of these interests by way of any stated intent in the statute?

The Petitioner asserts that it is a development of these types of considerations which a "reasonable fit" or "narrow tailoring" standard demands. To allow a State to regulate against First Amendment rights without this analytical consideration is contrary to numerous decisions by this Court and is in fact tantamount to an acceptance by default of nothing more than a "rationale basis" economic regulation standard.

In light of this Court's recent decision in Board of Trustees of the State University of New York v. Fox, ___ U.S. ____ (1989), Case No. 87-2013 (decided June 29, 1989), which addressed the years of conflicting and confusing federal court decisions regarding the application of the Central Hudson least

restrictive tests, the Petitioner now urges that this Court address the fundamental underlying question of whether or not a State can presume that certain types of truthful speech are inherently misleading or harmful.

No matter how it is construed or justified, the creation of a regulatory remedy for a problem which does not or may not in fact exist is per se unreasonable, irrational and unconstitutional as a restraint upon commercial speech without an assertion of any substantial State interest. Whenever a regulatory remedy is implemented only upon a presumption that the speech regulated is harmful, First Amendment rights and the tests which this Court has designed to protect those rights become nothing more than an academic illusion.

To prohibit a form of speech after an analysis of whether or not it is harmful is

one thing. However, to prohibit speech upon a mere presumption that it is false or harmful is censorship of a type and form which is directly contrary to the fundamental rights sought to be protected by the First Amendment.

If certain types of speech by their nature are self evident in their inherent misleading nature and not therefore subject to detailed State findings, then some fundamental tests identifying these "forms" of inherently misleading speech should be elaborated by this Court. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-653 (1985).

Petitioner submits that these fundamental issues of federal law have never been fully addressed by this Court even

though this Court in its last term noted probable jurisdiction to resolve this issue in Oring v. California State Bar, No. 87-1224 (appeal dismissed January 23, 1989).

Because of this Court's technical basis for dismissing Oring v. California State Bar, the Petitioner urges that the case at bar affords an excellent opportunity for this Court to address this fundamental issue for the first time.

ISSUE NO. 3

Does the legitimate State interest in protecting the right of privacy in the home when balanced against commercial rights of free speech guaranteed by the First Amendment permit a State to impose an absolute regulatory prohibition on door-to-door or telephonic solicitation of preneed funeral goods and services, when at the same time the State allows with absolutely no regulation

telephonic and door-to-door solicitation for all other types of goods and services? Martin v. Struthers, 319 U.S. 141 (1943) and Frisby v. Schultz, 56 U.S.L.W. 4785 (June 28, 1988).

ISSUE NO. 3

The importance of uninvited in-home solicitation as a means of disseminating information has been previously addressed by this Court in the case of Martin v. Struthers, 319 U.S. 139 (1943). It is interesting to note that even with the immense body of new law and the legal evolution which has occurred in the area of First Amendment commercial regulation, this Court has never overturned its decision in Martin v. Struthers.

In Martin v. Struthers, this Court found an Ohio city ordinance in violation of the First Amendment to the United States

Constitution because the ordinance absolutely prohibited door-to-door uninvited solicitation. The Court in its holding addressed the fact that uninvited door-to-door solicitation has been prevalent for centuries throughout this nation and that it has provided a very efficient and necessary means of communicating information and ideas to the general public. The court went on to hold that it is the right of the individual master of each household to determine whether or not they wish to hear the pitch of the solicitor and it is not up to the leaders of the community to predetermine what information the individuals of the community may acquire. This Court stated as follows:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of the free society that putting aside reasonable

> police and health regulations at the time and manner of distribution, it must be fully preserved." Martin, 319 U.S. at 147.

The mere remote possibility that information could be misleading or offensive to the general public, or that isolated abuses or mistakes have occurred has never been a sufficient basis for the enactment of governmental regulation prohibiting in their entirety certain modes of commercial speech. In Re R.M.J., 455 U.S. 191 at 203 (1982); Shapero v. Kentucky Bar Association, 486 U.S. ____ 108 S.Ct. 1916, 1923 (1988).

The State of West Virginia in the case at bar has prohibited in its entirety unrequested in-home solicitation or telephonic solicitation for only a single particular type of goods and services while at the same time the State continues to

permit in-home or telephonic solicitation for any other type of goods and services.

In its decision below, the Fourth Circuit cited the State's interest in protecting the right of privacy as a sufficient interest to support the regulation of commercial speech.

Assuming for argument's sake, that the privacy of persons in their homes is encroached upon by the act of a salesperson perpetrating an unsolicited door-to-door visit or telephone solicitation, if the State truly seeks to protect this right of privacy, it would prohibit all door-to-door or telephone solicitation in West Virginia not merely door-to-door or telephone solicitation for certain defined funeral goods and services. Obviously what the State is really seeking to do is shield consumers from

door-to-door or telephone solicitation of preneed funeral goods and services. The State's rationale is at worst an effort to politically protect funeral homes against competition, and at best an attempt to further the State's paternalistic opinion that the marketing of this type of goods and services is offensive when done door-to-door or by telephone.

If the State in fact sought to protect the privacy of the home, the regulation in question would not restrict the dissemination of certain information in a prescribed form. Instead, the regulation would prohibit the act of door-to-door or telephonic solicitation itself. It is the act of soliciting which encroaches upon a consumer's privacy.

Only in Ohralik v. Ohio State Bar Association has this Court absolutely

prohibited in-person solicitation or telephone solicitation based upon the content of the solicitation and its potential for imposing harm upon the persons solicited. However, even Ohralik is not similar to the case at bar since all attorneys similarly situated in Ohralik regardless of the type of legal services they seek to market are prohibited from in-person face-to-face solicitation of prospective clients. In the case at bar, any goods and services may be sold door-to-door or by telephonic solicitation in the State of West Virginia except for preneed funeral goods and services. Furthermore, at the same time, a special subclass of preneed funeral goods and services (or cemeteries which sell traditional cemetery item preneed funeral goods and services) all of which pose the same potential hazards to the asserted State

interests are totally exempt from the regulatory prohibitions in the statute. See West Virginia Code § 47-14-2 (1983).

As of the date of this petition, the Fourth Circuit and the Seventh Circuit have both sanctioned underinclusive First Amendment regulation on the basis of justifications applicable only to all inclusive regulation. Curtis v. Thompson, 840 F.2d 1291 (7th Cir. 1988); Guardian Plans, Inc. v. Teague, 870 F.2d 123 (4th Cir. 1989); and National Funeral Services v. Rockefeller, 870 F.2d 136 (4th Cir. 1989).

The Seventh Circuit upheld a prohibition against solicitation through the mail that applied solely to real estate agents, stating that it would not "second-guess the Illinois General Assembly and hold the statute unconstitutional merely because we may believe that Illinois could have prohibited

more expressive conduct in an effort to achieve its stated purposes." Curtis v. Thompson, 840 F.2d at 1303.

The need for a uniform federal rule in areas of underinclusive commercial speech regulation is required in order to reconcile the disparate results among the various federal circuits and their apparent refusal to apply this Court's opinions in Linmark Associates v. Willingboro Township, 431 U.S. 85 (1977) and Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). Content based regulation must be sustained if at all on the basis of the content of the speech and not the form. The State of West Virginia has never attempted to regulate the form of door-to-door solicitation or telemarketing. If legitimate State interests are proffered in support of regulating the form of speech, then this Court's decision in Linmark would

appear to dictate in favor of an all inclusive form based regulation.

ISSUE NO. 4

In regulating against a particular commercial activity, can the State's police powers regulate only a portion of those individuals who act in a manner which threatens legitimate State interests while at the same time exempting from regulation, without any rational basis and contrary to statutory intent, other individuals or entities who also undertake the same prescribed deleterious activities? New Orleans v. Dukes, 472 U.S. 297 (1976).

ISSUE NO. 4

West Virginia Code § 47-14-1 establishes the legislative intent for West Virginia Code § 47-14-1 et seq.:

> "It is contrary to public policy for any person to receive, hold, control, or manage funds or proceeds received from the sale of or from a contract to sell funeral

services, funeral goods, burial goods, or any one or combination of them whether payments of the same are made either outright or on an installment basis prior to the death of the person or persons so purchasing them or for whom they are purchased unless that person holds, controls, or manages those funds subject to the limitations and regulations prescribed by this article.

It is the legislative intent that the provisions of this article shall be construed as a limitation on the manner in which a person is permitted to accept funds in prepayment of funeral services to be performed in the future or the funeral or burial goods to be used in connection with the funeral or final disposition of the human remains so that at all times, members of the public may have an opportunity to arrange and pay for funerals for themselves and their families in advance of need while at the same time providing all possible safeguards whereunder such prepaid funds cannot be dissipated, whether intentionally or not in order that such funds are available for the payment of funeral services so arranged. Further, it is the legislative intent that no person may offer, sell, or negotiate for the sale of a preneed funeral service contract to anyone who is not licensed under this article."

The general standard which federal courts exercise in reviewing economic regulations promulgated by States has been established by this Court in its decision of New Orleans v. Dukes, 427 U.S. 297 (1976) where this Court stated:

> "a judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither effect fundamental rights nor proceed along suspect lines. See e.g. Daybright Lighting v. Missouri, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See e.g. Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)." See New Orleans v. Dukes, Id. at page 302.

In New Orleans v. Dukes this Court indicates that unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage; federal

courts presume Constitutionality of statutory discriminations. See New Orleans v. Dukes, 472 U.S. 297 at page 303.

The District Court and Fourth Circuit Court of Appeals in their decisions below analyzed the Petitioner's Fifth and Fourteenth Amendment arguments if at all based upon a general "rational basis" review of the legislation. Petitioner submits that this lesser standard was improper given the standard established by this Court in New Orleans v. Dukes regarding the potential impact of economic regulation upon personal fundamental rights.

Petitioner maintained below that the personal fundamental rights alluded to by this Court in New Orleans v. Dukes included First Amendment rights of commercial speech. The implication of this fundamental right dictated a more careful scrutiny of the

discriminatory provisions of the economic regulation set forth by West Virginia Code § 47-14-1. Petitioner submits that the discriminatory distinctions made by the statute should be viewed not under a general "rationale basis" theory as established by New Orleans v. Dukes, but instead by a judicial scrutiny tantamount to a standard similar to any other judicial review of commercial speech regulation.

Since the stated sole and predominant purpose of the statute is to protect against the depletion of preneed funds, the statute itself is irrational in its underinclusive exemption of certain preneed sellers (cemeteries) and certain preneed funeral goods and services as set forth in West Virginia Code § 47-14-2. The State has never proffered any distinction as to why contract purchasers who pay funds for these

same preneed goods or services are not also to be protected against the dissipation or depletion of their funds. Petitioner can find no basis by which the record or legislative history supports any discriminatory distinction between the need to preserve funds paid in anticipation of the future delivery of a casket as opposed to the future delivery of a headstone or a burial space in a vault or columbarium which may not even have been built at the time that the burial space was sold.

In the State of West Virginia, funeral directors are those individuals who are licensed by the State to make arrangements for, prepare for, and administer those functions necessary for the disposition of human remains. Funeral directors arrange services, prepare bodies, and sell specific goods to consumers for the final disposition

of human remains. Cemeteries, on the other hand, are those entities which provide repositories for human remains, including internment rights, columbariums, vaults, and other available space for the storage of human remains or the ashes of cremated human remains. There is, however, a vast amount of overlap in goods and services which are sold by funeral directors and those goods and services which are sold by cemeterians. For example, stones, bronze, markers, vaults and caskets are sold by both cemeteries and funeral directors in West Virginia.

The Petitioner maintains that the Circuit Court analysis of the Petitioner's Fifth and Fourteenth Amendment arguments never should have proceeded under the general rationale basis tests of New Orleans v. Dukes. This Court clearly stated that the legal rule of New Orleans v. Dukes does not

apply in situations where fundamental rights are involved. New Orleans v. Dukes, at 302.

ISSUE NO. 5

Do United States Supreme Court decisions require a Supremacy Clause preemption analysis to also consider the effect of inferior legislation upon a clearly stated superior federal policy? Hines v. Davidowitz, 312 U.S. 52 (1941); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

ISSUE NO. 5

In the Court's ruling below, the Fourth Circuit Court of Appeals improperly characterized the position of the Petitioner regarding its supremacy clause preemption arguments as follows:

> "NFS's first contention is that the funeral rule, promulgated by the FTC, so pervasively regulates the funeral industry that it

> preempts West Virginia's extensive regulation of preneed funeral contracts." National Funeral Services v. Rockefeller, 870 F.2d 136 at 138-139 (1989)

While the Court later hinted at an analysis which considered whether West Virginia Code § 47-14-1 et seq. was in conflict with 16 C.F.R. § 453. The Court never considered the underlying policy goals of 16 C.F.R. § 453.

This quotation and the Court's failed "conflict" analysis personifies both the misapprehension of the Fourth Circuit Court of Appeals regarding the Petitioner's supremacy clause arguments and further signifies that the lower Court's ultimate decision on this issue is one which is in direct conflict with applicable decisions of this Court.

The Petitioner's position has never included an assertion that the Federal Trade Commission's regulation at 16 C.F.R. 453 (1983) so pervasively regulated the funeral industry so as to preempt concurrent or ancillary regulation by the State of West Virginia.

The Petitioner's position is that the manner and form of regulation adopted by the State of West Virginia in regards to the prohibition of certain types of solicitation at West Virginia Code § 47-14-10 directly and seriously frustrate a superior federal policy enunciated by the Federal Trade Commission regulation set forth at 16 C.F.R. 453 (1983).

Even in situations where Congress has not totally preempted State action, this Court has elaborated instances of federal preemption under the supremacy clause in situations where a superior federal policy

may be frustrated by the State regulation in question. Hines v. Davidowitz, 312 U.S. 52 (1941); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

This Court in the decision of Capital Cities Cable, Inc. v. Crisp reviewed a State interest served by an Oklahoma advertising ban as applied to the importation of distant cable television signals. The Court stated as follows:

> "When this limited interest is measured against the significant interference with the federal objective of insuring widespread availability of diverse cable services throughout the United States - an objective that will unquestionably be frustrated by strict enforcement of the Oklahoma statute - it is clear that the State's interest is not of the same stature as the goals identified in the FCC's rulings and regulations. As in Midcal Aluminum, therefore, we hold that when, as here, a State regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law,

> and the State's central power under the Twenty-First Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between State and federal powers tips decisively in favor of the federal law, and enforcement of the State's statute is barred by the supremacy clause." (underscore supplied) Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). (underscore supplied)

In the decision of Capital Cities Cable, Inc. v. Crisp, Congress clearly did not totally preempt State regulation in the area of cable television regulation or alcohol advertising. There was also never any allegation of a direct conflict between the provisions of a State statute which required the deletion of all advertisements for alcoholic beverages contained in out-of-state cable television signals and the Federal Trade Commission's regulations dealing with cable television.

In fact the Capital Cities Cable, Inc. decision was very similar to the case at bar in that the argument of preemption rested with the State regulations frustration of a fundamental policy upon which the promulgation of Federal Communication Commission rulings and regulations had been based. That underlying policy was a very general public policy of insuring the widespread availability of diverse cable television service throughout the United States.

The Federal Trade Commission's funeral industry rule discloses that the preeminent underlying policy is to promote and effectuate the dissemination of pricing and product information in the funeral industry. While the language and requirements of the rule itself may not conflict directly with West Virginia Code § 47-14-1 et seq., the

Petitioner submits that the State's regulatory structure clearly impedes the full implementation, accomplishment, and execution of the objectives of superior federal law as enunciated by 16 C.F.R. 453 (1983).

Active door-to-door and telephone solicitation is the predominant, and perhaps the exclusive, avenue by which product and pricing information is provided to funeral consumers in the State of West Virginia. Petitioner agrees that the provisions of West Virginia Code § 47-14-1 do not specifically conflict with any particular provisions of the Federal Trade Commission's Rule since the Federal Trade Commission's rule only requires price disclosure when contact is initiated by the consumer.

However, the Supremacy Clause of the United States Constitution still prohibits the State regulatory scheme since it attempts

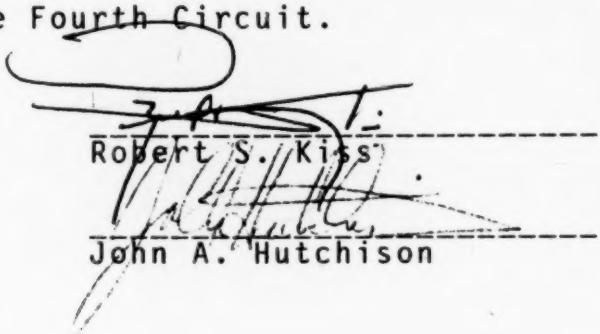
to restrict the dissemination of funeral product and pricing information to the consuming public without the enunciation of any substantial State interest for doing so.

It is the dissemination of precisely that same type of information which the Federal Trade Commission found necessary in order to alleviate the economic imperfections in the funeral industry markets. The opinion of the Fourth Circuit Court of Appeals clearly indicates its failure to address this question and that failure is directly inconsistent with prior decisions by this Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the United States Supreme Court, I, Robert S. Kiss, an attorney licensed to practice before the Court do certify under oath that I have served three (3) copies of the Petitioner's Petition for a Writ of Certiorari on the Respondents, John D. Rockefeller, Governor of the State of West Virginia (replaced by Gaston Caperton), Lawrence Barker, Commissioner of the Department of Labor for the State of West Virginia and the Department of Labor for the State of West Virginia by serving this date three (3) copies of the attached Petition for a Writ of Certiorari by depositing said copies in the United States mail, first class postage prepaid addressed to Charles G. Brown, Attorney General for the State of West Virginia and counsel for the Respondents at

the West Virginia Attorney General's Office, Capitol Building, Charleston, West Virginia 25305. I further certify under oath that all of the parties who appeared in this action before the Fourth Circuit Court of Appeals which are required to be served have been served and that the aforenamed parties are all represented by the Attorney General of the State of West Virginia and are a complete and total listing of all said parties to this action before the United States Court of Appeals for the Fourth Circuit.



Robert S. Kiss

John A. Hutchison

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

I, Benita D. Wiseman, a Notary Public in and for said county and state, do hereby certify that **ROBERT S. KISS** and **JOHN A. HUTCHISON** whose names are signed to the foregoing writing bearing date the 25th day of August, 1989, has this day acknowledged the same before me in my said county.

Given under my hand this the 25th day of August, 1989.

My commission expires: 9-17-96

Benita D. Wiseman
Notary Public